# Insurance Buyers' News

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## Does Your Social Media Policy Pass the Test?

**In past issues, we've urged employers to craft a social media policy to protect their organizations from charges of libel, harassment and trademark infringement that can result from employees' improper use of social media. However, you will also want to ensure your policies don't violate employees' rights.**

The National Labor Relations Act (NLRA) protects the rights of most private-sector employees to join together, with or without a union, in "concerted activity" to improve their wages and working conditions. Yet employers do have rights to protect the reputation of their organization, protect trade secrets and protect staff members from harassment.

Where do employers' social media policies and procedures vi-


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## This Just In

**As of late last year, fewer than 10 percent of the policies written by the National Flood Insurance Program (NFIP) covered commercial properties. Most owners of commercial properties obtain flood coverage through the private market. However, these policies typically have high deductibles.**

**The NFIP will cover commercial properties with limits up to $500,000 for buildings and $500,000 for contents. Residential commercial properties may obtain coverage as well, including hotels/motels, apartment buildings and assisted-living facilities.**

**Owners of buildings covered by an NFIP policy should understand that the NFIP's "substantial**

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olate employee rights under the NLRA? Test your knowledge by seeing how you'd handle these actual cases brought before the National Labor Relations Board (NLRB).

1 An employee of a nonprofit was preparing for a meeting with the executive director regarding a co-worker's complaint that the employee in question and her co-workers didn't help the employer's clients enough. The employee posted a question on Facebook, asking fellow workers for their opinions. The employer fired this employee and four co-workers who responded to the Facebook question. The employer had reason, since the discussions had occurred in a "public" forum: true or false?

**False.** NLRA protects employees engaged in "protected concerted activity" when they discuss terms and conditions of employment with fellow employees, even if that discussion takes place on a public forum such as Facebook. In this instance, the employee wasn't merely voicing her own concerns, but was asking fellow employees for their input—which the NLRB interprets as "concerted activity."

2 An employee who was under investigation for a customer complaint posted negative remarks about her supervisor, including calling her a "scumbag" on her personal Facebook page. The employer terminated the employee because the Facebook postings violated its policy prohibiting employees from making disparaging remarks on the Internet and social media. The employer had the right to fire this employee: true or false?

**False.** The NLRB states, "It is well established that the protest of supervisory actions is protected conduct under Section 7." Regarding the name-calling, the NLRB states, "...the name-calling was not accompanied by verbal or physical threats, and the Board has found more egregious name-calling protected."

3 An employer, a nonprofit facility for homeless people, discharged an employee for inappropriate Facebook posts to friends that referred to the employer's mentally disabled clients. The firing was a violation of the employee's rights under the NLRA: true or false?

**False.** Because the employee's remarks were not directed at fellow employees, and because they were not related to the conditions of employment but simply comments on what was happening during her shift, the NLRB concluded that the employee was not engaged in protected concerted activity and therefore the discharge was not unlawful.

4 A company includes an interviews policy in its employee handbook, which states that the public affairs office is responsible for all official external communications. The policy also states employees must maintain confidentiality about sensitive information and directs employees to respond to all media questions by referring them to the public affairs office. The employer has the right to control communications in this way: true or false?

*This Just In*

**damage" rules apply. If the owner wishes to improve or repair an existing building, it must be brought up to current floodplain management standards if the cost of improvements or repairs exceeds 50 percent of the building's market value (not including land value). For a building located in a floodplain, standards could require raising or even relocating the building.**

**Over the past five years (2006-2010), the average commercial flood claim has amounted to just over $85,000. Typically, there's a 30-day waiting period from date of purchase before your policy goes into effect. To ensure you have coverage in place before the spring flooding season, please contact us today.**

**True.** An employer has a legitimate business interest in limiting who can make official statements for the company. Its rules cannot be so broadly worded that employees would reasonably think that they were prohibited from exercising their Section 7 right to speak with reporters about working conditions.

However, a media policy that simply seeks to ensure a consistent, controlled company message cannot be reasonably interpreted to restrict Section 7 communications.

5 A retail store operator took disciplinary action against a customer service employee who called his assistant manager an insulting name on Facebook and com-

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plained about being chewed out for mispriced or misplaced merchandise. The employer's actions in this case were allowed by the NLRB: true or false?

**True.** Although co-workers made "hang in there" type remarks to the Facebook posting, the NLRB found insufficient evidence that the employee engaged in concerted activity. When an employee engages in "individual gripes" against the employer, that speech is not "concerted activity" and not protected by the NLRA.

**6** A hospital issued a rule prohibiting employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity. Another rule prohibited any communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member. An employee complained about a colleague's pattern of calling in sick or absent on her own Facebook page, and asked anyone with other details to contact her. The hospital was justified in terminating her, since she violated the hospital's policy against damaging the reputation of another staff member: true or false?

**False.** The NLRB determined the employer's social media policies were overly broad. The rules provided no definition or guidance as to what the employer considered to be private or confidential, yet the employer relied on it in terminating the employee. Employees could reasonably construe the rules to prohibit protected conduct, as information on salary and working conditions could be considered protected information under the policy.

These cases underscore two main points regarding the NLRB and social media:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

For assistance in drafting a social media policy, please consult an employment attorney. We can ensure your firm has the coverage to protect itself from social media and employment liability claims—please contact us for more information.

# Why You Need Contingent Business Interruption Coverage

**No man is an island, they say. And neither is a business. As Hurricane Sandy and Winter Storm Nemo demonstrated, businesses today are increasingly interdependent. Contingent business interruption insurance can protect you when a covered loss affects a "contingent business location."**

Most businesses have some business income (also known as "business interruption") insurance. If you have a business owner policy (BOP), a policy that packages the basic property and liability coverages together, you have basic business income coverage. This coverage reimburses the insured property owner for income lost when your business shuts or slows down due to property damage from an insured cause of loss *on your insured premises.*

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Most policies also contain "civil authority" clauses that cover you for up to two weeks' of lost income when a "civil authority prohibits access to the described premises due to direct physical loss of or damage to property, other than the described premises, caused by or resulting from any covered cause of loss." As an example, if police barred access to your street due to a fire at a neighboring building, your policy would provide coverage.

But, as Hurricane Sandy demonstrated, the economic impact of a disaster can be felt far and wide. What if a fire burns a major supplier's plant and you can't obtain parts? Or storm damage causes a shutdown for a major client, forcing you to delay a delivery of goods or services?

Contingent business interruption insurance, also known as "dependent property insurance," provides coverage for these types of losses. You can buy contingent business interruption coverage as an endorsement, or addition, to your property policy or business package policy. It reimburses you for lost profits and extra expenses resulting from a business interruption at the premises of a customer or supplier, when the interruption is caused by a peril covered by your property policy. You can buy "blanket" coverage, which covers all customers and suppliers, or you can buy specific coverage for properties you name in the policy.

Contingent business interruption coverage does not cover you for losses due to 1) interruptions in utility service or electrical power from off-premises, 2) the actions of civil or military authorities, 3) lack of ingress or egress, 4) changes in temperature caused by damage to heating or cooling equipment or 5) damage at another location owned by your company. Contingent business interruption coverage also has a "time deductible" that begins after the covered property damage or loss occurs. Usually expressed as hours (such as 24 or 48), the insurer will not cover income lost during this time.

## Do You Need Contingent Business Interruption Coverage?

Contingent business interruption coverage makes most economic sense for a business that:

- Depends on a single supplier or a few suppliers for materials or merchandise. For example, a computer manufacturer may rely on one supplier for most of its memory chips.
- Depends on a few major customers or clients to buy their products or services.
- Depends on another nearby business to generate traffic. For example, smaller retail stores in a mall depend on a few major "anchor stores" to draw customers to the mall.

We can help you determine if your business needs this coverage and if so, how much. For more information, please contact us.

# Letters of Recommendation: Do's and Don'ts

**References and letters of recommendation can be a damned-if-you-do and damned-if-you-don't situation for employers.**

## Damned if you do…

Fear of defamation lawsuits brought by former employees has altered the way employers provide job references. Companies have no legal obligation to provide prospective employers with information on their former employees. Because employers have been found liable for defamation after providing negative information about past employees, some employers have taken the position of providing no information about past employees except dates of employment, title and salary.

## Damned if you don't…

However, if you *do* provide references, make sure they're honest. Include negative information, particularly if the former employee behaved illegally or acted in ways that could endanger others. In a 1995 case, the 5th District Court of Appeal ruled that a young female plaintiff who was molested by her school's vice principal could sue three former school districts that wrote glowing letters of recommendation for the vice principal, but failed to disclose their knowledge of his past sexual misbehavior.

The Appeals Court said that the author of a job recommendation letter has a duty "not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations

would present a substantial, foreseeable risk of physical injury." According to the court's reasoning, employers have two viable alternatives to providing a reference that omits information about criminal, dangerous or illegal behavior: they can provide a "no comment" letter of reference that contains no affirmative representations about the former employee, or they can disclose all relevant facts regarding the past employee's background.

Several states have developed legislation to protect former employers who provide negative information in job references. In Kansas, for example, an employer is immune from civil liability when providing references

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## Reference do's and don'ts

- ✔ **Develop a procedure for providing references about former employees. Do not permit employees other than those specifically designated to respond to employment inquiries.**
- ✔ **Employers have no duty to disclose more than basic employment information about past employees, but opting for either full disclosure or no comment may be the safest approach.**
- ✔ **Purchase employment practices liability insurance (EPLI)—your general liability policy does not cover employment-related liability. An EPLI policy does—whether the legal action involves a current employee, past employee or job applicant. If you already have EPLI, evaluate your coverage limits. Is it enough to protect your company from a large suit? A class action suit? Be sure to check whether defense costs are contained within the policy limits. If they are, this will reduce the amounts available to you for settlement or court awards.** ■

unless "lack of good faith" can be shown by "clear and convincing evidence."

If you're asked for references on a past employee whom you have reason to believe may become violent or harm someone, you may want to consult with an attorney specializing in employment issues before providing any kind of reference. In most cases, having a written procedure for providing references can help you avoid defamation suits. See the accompanying box for some suggestions. For more information on minimizing your employment practices liability exposures, please call us.

## Do You Need Specialized Liability Coverage?

Every organization—including nonprofits—needs liability insurance to protect it from the costs of third-party claims of bodily injury, property damage, medical expenses, libel and slander. Liability insurance also covers the cost of defending lawsuits, and settlement bonds or judgments required during an appeal procedure.

The standard commercial general liability policy (CGL) or business owner package policy (BOP) provides the basic coverages that most organizations need. However, organizations with certain risk exposures might need additional coverage.

**Employment practices liability:** With the high costs of employee discrimination or harassment lawsuits, no employer should risk going without coverage for employment-related claims. Yet many CGLs specifically exclude them. Some BOPs include coverage for employment practices, but usually with very low limits. Specialized employment practices liability coverage can provide higher limits; you can add this coverage to an existing liability policy or buy a standalone policy.

**Product liability:** Companies that manufacture, wholesale, distribute or retail a product may be liable for its safety. Product liability insurance protects against financial loss when a defective product causes property damage or injury. The amount of insurance you should purchase depends on the products you sell or manufacture. A clothing store would have far less risk than a small appliance store, for example.

**Professional liability:** Businesses or organizations providing services should consider having professional liability insurance (or **errors and omissions insurance**). This coverage protects the organization against claims of malpractice, errors and negligence in provision of services to your customers. Some states require certain professionals to carry professional liability coverage. For example, certain states require physicians to buy malpractice insurance.

**Pollution liability:** The CGL explicitly excludes coverage for bodily injury or property damage arising out of the release of a pollutant. It also broadly defines "pollutant" to include smoke, vapor, fumes, chemicals, waste and more, but does not limit the exclusion to these specific "pollutants." Thus, your CGL is unlikely to cover many pollution claims. If you have pollution liability risks, we can tailor one of many specialized pollution (or "environmental impairment") policies to your needs. Please call us for more information.

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